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ABSTRACT

The protections usually afforded by the courts and institutional custom when a tenured faculty member is dismissed for cause are not available when dismissal is the result of a determination of financial exigency. The courts have not ascertained what constitutes financial exigency, preferring to leave the definition to the governing authority and administration of each institution. The courts have relied on administrators alone to establish procedures for identification of programs and individuals to be affected by the determination of financial exigency. There are two approaches that faculty and administration may take to resolve these problems: the informal method of reaching agreement on the basis of some form of shared authority, and the formal method of including in collective bargaining agreements procedures that provide protection for faculty interests and job security. (Author/MSE)

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Tenure and Termination in Financial Exigency

Marjorie C. Mix

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Research Report No. 3
1978

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Foreword

For years higher education faculty believed that tenure would protect them from losing their jobs in all but the most extreme circumstances. These circumstances usually involved personal transgressions of an immoral or criminal nature; in other words, individually determined action. Therefore, it was believed that if a professor had tenure and did not transgress the law, the future would be predictably secure. At the same time it seemed inconceivable that any reputable institution of higher education would get into a financial state where it would have to fire tenured professors to keep its doors open.

In the late 1960's these two assumptions were shown to be false as more and more institutions, suffering from increased costs, declining resources, and falling enrollments, began to lay off non-tenured and tenured faculty. Faculty reaction was to abandon the collegiate role for the role of adversary, to move from the campus to the courts. To the consternation of faculty, the courts consistently upheld the right of the institution to take whatever measures were necessary to maintain financial stability, even if this meant dismissing tenured faculty.

These events raised some very fundamental questions: What good was tenure? How could tenure act as a protection for academic freedom and not guarantee a person's job? Were tenured faculty rights at public institutions different than at private institutions? If tenure did not offer job protection, what process or system would offer such protection?

Marjorie Mix, who was a legal associate with the Governor's Office of Employee Relations in Albany, and who will be joining the Department of Higher Education at SUNY, Buffalo, has thoughtfully approached these questions. In this monograph Dr. Mix, who has both a Ph.D. in higher education and a J.D., has reviewed the major court cases covering financial exigency and tenure. As a result of her analysis she has developed two possible approaches that would insure a more equitable decision-making process and offer the development of mutually acceptable solutions to faculty and institutions before the crisis of financial exigency arises.

Jonathan D. Fife, Director
ERIC Clearinghouse on Higher Education

Contents

Overview 1

Tenure 3

Historical Aspects of Tenure 3

Tenure and the Law 5

Financial Exigency and Tenure 11

The Concept of Financial Exigency 11

Financial Exigency and Loss of Tenure 12

Determination of Financial Exigency 12

Good Faith in Financial Exigency 13

Constitutional Procedures and Identification of Individuals for Termination 15

Decision-Making Authority 17

Possible Solutions 19

An Informal Approach: Faculty-Administration Consensus 19

A Formal Approach: Collective Bargaining 22

Conclusion 24

Bibliography 25

Supplementary Bibliography 27

Overview

The economic climate and the shrinking pool of college-bound students have combined to make painfully apparent the extent of expansion of program offerings and specialities in institutions of higher education since the late 1950's. As higher education enters a period of zero growth and constriction of available resources, the need to curtail or eliminate many of these program offerings has become pressing. The "publish or perish" maxim of faculty now has an institutional correlate of "sink or swim." Just what constitutes financial exigency and how institutions may choose to deal with it to eliminate resource drains are the issues under consideration.

Historically, tenure has provided faculty with certain protections: the right to freedom of inquiry and the dissemination of knowledge, as well as the right to expect that employment as a faculty member will continue under ordinary or usual conditions—but never with a vested or absolute right to a job. Termination of tenure for reasons of financial exigency is a condition somewhat out of the ordinary with which administration and faculty must come to grips. Lack of experience in matters of financial exigency and abrogation of tenure agreements as a result of this exigency has led to much confusion and unhappiness on all sides. Frequently, faculty members have gone to court to seek clarification of the extent of their rights and prerogatives that can be expected to obtain when one is tenured. Faculty have also challenged the rights and responsibilities of management in declaring the existence of financial exigency and the subsequent procedure employed for curtailment of operations and termination of tenured faculty employees.

This report focuses on the condition of tenure, financial exigency, and the impact of financial exigency on tenured teachers in private and public institutions. Faculty in public institutions, when tenure is abrogated, base remedial claims on the 14th amendment—the claim is that they have been deprived of property rights without due process. In private institutions, the claim of the terminated faculty member centers on breach of contract for personal service. Neither approach has met with particular success in the courts.

Tests for financial exigency are far from cut and dried; the determination of financial exigency seems to hinge on the perception of administrators that their fiscal problems are so pressing as to warrant some immediate action, such as curtailment of program offerings and/or faculty. The courts have been inclined to accept and support this position except in instances (*AAUP v. Bloomfield College* 1974) where there has been substantial evidence that the determination of financial exigency was clearly made in bad faith.

Since it is clear that tenure provides no protection in instances of financial exigency, and since the courts seem inclined to uphold administrative determinations that financial exigency exists, except in obvious cases of bad faith, it is necessary to consider the possible approaches the educational community might take to provide some rational basis for dealing with financial exigency.

There are two obvious approaches, neither of which has as yet proven itself wholly satisfactory to either administration or faculty. The traditional collegial approach, found in the AAUP literature, engages faculty in the determination of financial exigency and encourages "'collegial" judgment about what faculty areas should be eliminated; the identification of specific individuals within these areas is left to the administration—gladly so, one has the impression. The AAUP approach is very appealing to those faculty and administrators who feel comfortable with a consensual model that diffuses both responsibility and blame for decision-making with considerable effectiveness.

The collective bargaining approach to financial exigency and the results thereof are cleaner to some extent. The responsibility for declaration of financial exigency is placed with a named administrator (chancellor or designee) or group of administrators, and the procedural steps for dealing with the termination of tenured faculty are spelled out, usually in considerable detail.

Either approach may prove workable and beneficial to a given institution. Whichever is adopted, the time has come to face the problems of financial exigency squarely and come to grips with the nature and ramifications of the problem within the realm of higher education rather than within the courts.

Historical Aspects of Tenure

The nature of tenure has changed over time from a privilege granted by a ruling authority to a legal entitlement, but the purpose of tenure has remained essentially unchanged, i.e., to afford the scholar certain protections. The primary purpose of tenure is the protection of academic freedom (the unfettered pursuit and communication of knowledge). This purpose has been clouded by the persuasive arguments that tie the existence of tenure to job security that tenure is seen to provide. In point of fact, tenure serves both purposes equally well.

Tenure, or academic protection, has a long history. Metzger (1973) traces the antecedents of modern tenure to 1158 when Emperor Frederick Barbarossa issued the *Authentica Habita,* which provided scholars with safe conduct in journeys, protection from attack on their domiciles, and compensation for unlawful injury. Thus there is a historic precedent for the privileges sought and granted by tenure that is more than exclusively academic. However, the ease with which such privileges could be removed was as impressive as the protections provided; moreover, the protections were quite likely to be protections against assault from outside the scholarly community rather than from within, the community at that time being dominated by religious orders and practice.

The early development of tenure in the United States reflects views developed at the English universities of Oxford and Cambridge (Byse and Joughin 1959). After initial and unsuccessful attempts by Harvard to become a truly independent company of self-governing scholars (an attempt which failed, in part, for lack of funds), the relationship between faculty and the institution in this country gradually became one of a contractual nature that focused on the duration-of-service factor. It was from this concept that the practice of granting "indefinite tenure" was developed. It was a notion that offered little except psychological comfort to faculty who believed that it meant lifelong service. However, legal decisions made it clear that all such "indefinite" appointments were "temporary" in the eyes of the law. One's "indefinite tenure" was, in fact, dependent on the goodwill of the institution where one served (Byse and Joughin 1959).

At the turn of the century, Professor Ross, an economist at Stanford, was dismissed under what can best be described as questionable circumstances. This threat to both academic freedom and professional security generated considerable uneasiness in the academic community. By 1915, the academic community, led by a group of professors at Johns Hopkins, responded by forming the American Association of University Professors. One of the purposes of the new organization was to: ". . . undertake the gradual formulation of general principles respecting the tenure of the professional office and the legitimate ground for the dismissal of professors" (Metzger 1973, p. 135) Over the years, the AAUP has formulated at least four statements (1915, 1925, 1940, 1958) about academic freedom and academic tenure. The statement issued in 1940 as the *1940 Statement of Principles on Academic Freedom and Tenure* was endorsed jointly by AAUP and the Association of American Colleges; it remains the standard most widely subscribed to by the profession. In the 1915 statement, "fair procedures" in dismissal cases were set forth by the organization. They included the right of:

> Every university or college teacher . . . before dismissal or demotion, to have the charges against him stated in writing in specific terms and to have a fair trial on those charges before a special or permanent committee chosen by the faculty senate or council, or by the faculty at large ("General Report of the Committee on Academic Freedom and Academic Tenure," AAUP Bulletin, 1915, 1:41-42).

By 1925 the procedures mandated that the "accused teacher should always have an opportunity to face his accusers," and recognized financial exigency as a legitimate, though certainly unusual, reason for termination. The 1940 statement shored-up job security and eliminated the "necessary" correlation of tenure with academic rank.

Misconceptions about tenure, what it is and what it provides, continue to prevail both within and without the academic profession. While tenure obviously serves the twofold purpose of being a safeguard for academic freedom and providing professional security, it is not and was at no time in history meant to provide the academic with a sinecure. Once granted, it provides only an expectancy of continuation of employment—employment that cannot be terminated arbitrarily and capriciously at will. The legal implications of such an expectancy are treated at length below. In instances where dismissal is for cause, tenure has come to mean

a guarantee of certain minimal due process for the individual; in instances where dismissal is for financial exigency, the safeguards provided by tenure remain to be fully determined.

Tenure and the Law

Given the popular misconceptions about tenure, including the belief that tenure provides a guarantee of lifetime employment, it is necessary to consider what the law and the courts have had to say about tenure. Rosenbloom (1973) points out that:

> Reluctance, amorphousness, a substantial degree of diversity, and even a modicum of whimsy have marked judicial conceptions and appraisals of tenure over the years (p. 161).

In 1959, Byse and Joughin identified the "essential characteristics of tenure [as] continuity of service." This means that the institution granting tenure has relinquished to the teacher in its service:

> either as a legal obligation or a moral commitment . . . the freedom or power it would otherwise possess to terminate the teacher's services (Byse and Joughin, 1959, p. 71).

In fact, tenure represents not the guarantee of a job, but an expectancy of continued employment—under usual and ordinary circumstances. It does not:

> . . . vest a faculty member with the right to continued appointment to the faculty. . . . A vested right is a right, fixed, settled, absolute, and not contingent upon anything (*Rebors v. Case Western Reserve University* 1975, p. 420).

At a time when institutions are facing serious fiscal problems and reduced enrollments, a consideration of the rights and interests protected by tenure and institutional determination to abrogate tenure agreements on the basis of financial exigency seems in order. If tenure is not a bar to dismissal when institutions are facing serious financial difficulties, then the protections that are available to tenured faculty members marked for removal, and the institutional measures that might be considered to assure fairness need to be examined.

It should be immediately and clearly understood that there are significant legal differences between the bases for tenure in a public institution and a private institution. The teacher in a public

institution has an expectancy of continued employment (tenure) based on a legal theory somewhat different from that of a private college teacher. The tenured teacher threatened with dismissal from a state-supported public institution would claim violation of a tenure plan "promulgated by the governing board (as) a form of sublegislation which has the force and effect of law" (Rosenbloom 1973, p. 161; also see Byse and Joughin 1959, p. 72).

This treatment of tenure as having legal status gives certain procedural protections to the teacher who contests the dismissal as wrongful. The exercise of governmental power by removal of the tenured teacher can be construed legally as taking property without due process of law. In the case of dismissal for cause, minimal notice and hearing requirements are generally imposed; whether the same minimal requirements are imposed when the reason is financial exigency is considered more fully below. The tenured teacher in a public institution is able to ask for reinstatement as a remedy, since dismissal would be challenged as beyond a governing board's authority and contrary to state law.

The tenured teacher in a private college or university who is identified for dismissal, whether on the basis of financial exigency or for cause, must challenge such action as a breach of contract. Given the long tradition of the defense of academic freedom, procedural protections have become customary when dismissal is for cause. There is as yet little case law and much confusion about how the individual can expect the institution to be answerable for minimal due process when financial exigency is claimed.

In the private sector, the remedy is limited to money damages on the theory that courts will not require the enforcement of a personal service contract. Only in one instance (*AAUP v. Bloomfield College* 1974) has the court ordered reinstatement of tenured teachers in a private institution, since by doing so it was not requiring the continuance of undesirable relationships. (This will be considered more fully, as it represents the single instance in which financial exigency was held to be questionable.)

When fiscal constraints are in conflict with individual interests the courts often rely on policy considerations, such as the necessity to keep control of the public coffers with public officials, the underlying consideration given to maintaining managerial prerogatives in the administration and governing boards of institutions, and the requirement that institutions continue to provide viable academic programs. In the face of these policy positions, the de-

fense of tenure as protective of academic freedom has rested on the analysis that identifies such freedom with first amendment rights, at least in the public sector. Where dismissal is the result of financial exigency, it seems that no such constitutional protection is recognized as yet.

While it is enough for present purposes to point in passing to these differences between public institutions and private institutions and the obligations created by tenure, an examination of dismissal for reasons of financial exigency must be distinguished from dismissal for cause. Attempts to protect academic freedom by closely monitoring administrative actions in dismissing faculty members who have exercised first amendment rights, and who are terminated under cover of claims of incompetence or other cause, are not transferable to the situation where dismissal results from administrative identification of program curtailment or resource allocation in times of fiscal restraint. Efforts have been made to clarify the legal aspects of the former (Finkin 1973; Matheson 1975; Pettigrew 1971), and one effort to proble the relationship between financial exigency dismissals and the protections of academic freedom has been made *(NOTE,* 52 *Denver Law Journal* 911, 1975).

In place of traditional considerations of tenure as a protected right, it is now essential to examine the legal concept of tenure, the way in which the courts have treated it, and how individual and institutional interests have been construed by the courts. The possibility of individual protection and institutional procedures assuring fairness becomes more significant in the face of an economic depression in higher education that affects tenured teachers and institutional mission alike.

In two recent companion cases *(Board of Regents v. Roth* 1972; *Perry v. Sinderman* 1972)[1] the Supreme Court analyzed the interests of the individual employee's protected rights. Writing for the majority in *Roth,* Justice Stewart noted that a person has a protected interest, similar to a property right, in his employment if he has:

> . . . more than an abstract need or desire for [the continued employment]. He must have more than a unilateral expectation of it. He must indeed have a legitimate claim of entitlement to it *(Perry v. Sinderman* 1972, p. 577).

1 For a review of these two cases see Shulman's 1973 AAHE-ERIC research report, *Employment of Nontenured Faculty: Some Implications of Roth and Sinderman.*

Thus, the tenured teacher, it is reasoned, has more than a mere belief that he or she will be rehired, more than a unilateral subjective expectation of reemployment. This legitimate claim of entitlement could come from the creation of the interest by the state or by the creation of a contractual interest. It follows that, once created, the individual cannot be deprived of this property interest without the due process of law guaranteed by the Constitution.

While the individual may have a property interest in continued employment, there is some difference of opinion as to how secure this interest is in the face of competing institutional interests, such as those resulting from financial exigency. For example, the protection afforded by such entitlement is far from certain in public employment. In the case of *Roth (Board of Regents v. Roth* 1972), Justice Douglas took the dissenting view that, "public employment may be considered one of the important interests [that] are not to be denied or taken away without due process." He went on to say:

> We should now add that nonrenewal of a teachers contract, whether or not he has tenure, is an entitlement of the same importance and dignity as denial of a driver's license *(Bell v. Burson)*, denial of tax exemption *(Speiser v. Randall)*, and withdrawal of welfare benefits (Goldberg *v. Kelly) (Board of Regents v. Roth* 1972, p. 548).

Douglas's view goes further than the majority opinion in *Roth*, since he presumes a protected interest not defined as the right to property or to liberty. In *Schlochower v. Board of Education* (1955), where discharge from public employment was found to require procedural protection, the court also found that "protection of the individual against arbitrary action . . . [is] the very essence of due process" (1955, pp. 551, 559).

The nonrenewal of a nontenured teacher's contract does not trigger the opportunity for a hearing, unless the teacher shows that the decision not to rehire has deprived him or her of a property interest in continued employment without having tenure or a contract. The case of *Roth* involved a nontenured teacher, but the court implied that having tenure allowed the necessary entitlement to continued employment unless sufficient cause for dismissal was shown. *Perry v. Sinderman* (1972), turning on different facts, allowed the interpretation that the plaintiff had an entitlement to continuing employment based on usual practice at an institution having no tenure policy—thus *Sinderman* had quasi-tenure based on the usual practice of the institution.

The majority view in *Sinderman* and the view represented in Douglas's dissent in *Roth* was challenged in *Arnett v. Kennedy* (1974). Justice Rehnquist, writing the plurality decision, collapsed the two-step majority test applied in *Roth* and *Sinderman* to one step; the two-step test applied in *Roth* required the court to look first at the "nature of the interest" to see if it justified due process protection, and then, if such protection was justified, to balance individual and state interests to determine what form the protection should take. The single test applied by Justice Rehnquist in *Arnett* required that the interest be examined to determine whether the government could have eliminated the entitlement altogether. If the government could, then the procedural protection offered by the state could be considered gratuitous, and not subject to the usual constitutional requirements.

By reasoning that the state may define what is and what is not property and, therefore, what procedural rights are required, Justice Rehnquist found himself in disagreement with six other judges. These six seemed to at least agree that if a statute requires that dismissal be "for cause," a property interest is created and therefore the court will engage in a balancing test and construct constitutionally required procedures. They essentially argued that when a public employee establishes that a property interest exists, he or she is entitled to a full evidentiary hearing before an impartial examiner at some "meaningful" point in time (*Note*, 50 N.Y.U.L. Review 310, 1975).

That the federal courts, in attempting to apply reasoning of the *Roth-Arnett* line of cases, have been somewhat inconsistent is not a surprise. In 1976, the court limited the standard line more severely in *Bishop v. Wood* by requiring that only when state law has "clearly" given the public employee some guarantee of continuity in employment does the employee have a property interest to be protected.

While the courts try to avoid the role of decision-maker in each and every case, and to step adroitly around the precise nature of the interest of the employee, where there is an expectation of continuity, law review commentators encourage standards closer to those suggested by Justices Douglas and Marshall in their dissents in the *Roth* case. When the question of whether the public employee has received fair treatment from the government is asked, the presumption that the government ought always be responsible for explaining dismissals will prevail rather than a requirement

that the employee demonstrate a legally defensible interest in his job to be entitled to ask for fair treatment.

The protections afforded by contractual obligations or property rights and the changing views of the courts on the extent to which these interests will be protected are closely allied to situations in which continued employment may have been terminated as a way to deny individuals full exercise of first amendment rights. While it is possible that such denial of constitutional rights is covered by dismissals occasioned by financial exigency, no case as yet gives a clear indication of how the rights of a tenured teacher are construed when dismissal is not "for cause" but because budgetary constraint demands it.

In whatever way the courts have chosen to view the quality of the right or interest the tenured faculty member holds, there is little doubt that tenure is not enforceable if financial exigency is claimed and supported. In *Levitt v. Board of Trustees of Nebraska State Colleges* (1974), after the court assumed that the proof of an operating deficit established financial exigency, there was a clear determination that no guarantee of continued employment existed. The court cited the *Roth* (1972) decision and noted that in a situation of financial exigency, "plaintiffs' tenure rights do not guarantee them continued rights to public employment" (p. 945). This narrow reading of the *Roth* case typifies the stance of the courts when the assumption of financial exigency is accepted.

When dismissal is due to financial exigency, all questions of contractual rights, entitlements (statutory or implied), and standard procedural protection of the individual are tilted to suggest different outcomes. While an ideal approach would certainly be to require government explanation in all dismissals (cause and financial exigency), and while the courts do rely on administrative determination of financial exigency, one limitation always remains: the administrators of institutions determine whether they must dismiss tenured faculty in the face of financial exigency, and the interests of faculty, however construed, are balanced against this perceived institutional necessity. Therefore, an examination of how such financial exigency is established as a condition necessary to dismissal is in order.

The Concept of Financial Exigency

On the whole, definitions of what constitutes financial exigency are sparse. Although the term appears in the literature of higher education with increasing frequency, it is seldom defined in concrete terms; rather, references to it indicate what may or should be done when financial exigency is determined to exist. Financial exigency is generally construed to obtain when pressing financial matters require immediate responsive action of some sort, and generally involves dismissal of teaching staff. It has been said to begin:

> . . . not when a school is bankrupt, but when it has significant difficulty in supplying additional positions to departments in the ascendency while maintaining reasonable equity in teaching loads, class sizes and research opportunities appropriate to each discipline (Brown 1976, p. 7.)

Other references to financial exigency fail to define it or to set any standard for its diagnosis. They speak to the issue of who has administrative responsibility for declaring that such a condition exists—for example, the "chancellor or his designee" (Agreement Between the State of New York and United University Professions, Inc., 1977). They may caution that results of a declaration that financial exigency exists will "reduce or eliminate programs and terminate staff (Furniss 1975, p. 159), or cause "dismissal of tenured faculty" (Matheson 1975, p. 613).

In the Bloomfield College case *(AAUP v. Bloomfield College 1974)* the Appellate Division opinion indicated that the phrase "state of urgency" was sufficient to describe exigency. The precise nature of the condition runs the gamut from an institution that finds it difficult to supply new positions to permit expansion while maintaining equity in current faculty teaching loads, class enrollments, and research opportunities, to one where bankruptcy is the only alternative. Somewhere in between the "something-must be-done" situation and the "we-cannot-go-on-unless-we-dismiss-tenured-teachers" predicament is the institution with liquidity problems, one operating under a deficit, and one that identifies with the "crisis-of-survival" notion of the AAUP.

There is no accepted definition of financial exigency that can be applied universally by administrators when trying to decide how to

proceed or by the courts when questions of the protection of individual rights or interests are raised after faculty dismissal. This presents a serious and continuing problem.

Financial Exigency and Loss of Tenure

Deciding what financial exigency is and when financial exigency exists has been primarily a determination of the courts only when a challenge is made by the dismissed faculty. Ordinarily, the burden of establishing financial exigency rests with the party asserting it (Corbin 1964), and the cases dealing with dismissals due to financial exigency reflect a mixed response to this extraordinary condition. What has happened in most instances has been some variation on the following process: A college or university administration makes the decision that its fiscal condition requires termination of tenured teaching contracts—either at the mandate of its governing board in a private institution, or as a result of a state budgetary mandate (legislative, executive, or both), in public institutions. Procedures are developed by the administration and followed on the assumption that financial exigency exists and that such dismissals are in order.

Tenured faculty affected usually seek a preliminary injunction and finally a permanent injunction, generally demanding reinstatement. Most of the cases reported take issue with the good faith of the administration in the initial determination of financial exigency *(AAUP v. Bloomfield College* 1974) or in the fairness of the procedures developed to deal with the decision that financial exigency exists *(Levitt v. Board of Trustees of Nebraska State Colleges* 1974; *Browzin v. Catholic University* 1975; *Johnson, et al. v. Board of Regents of the University of Wisconsin System* 1974; *Lumpert v. University of Dubuque* 1975). This has left the faculty, the administration, and the courts with little more than a case-by-case consideration of the legal issues, rather than a workable definition that would guide the administration as to when it should move to terminate tenured faculty. The question really centers on who will be responsible for the decision that financial exigency exists and the tenure agreement abrogated, and on the basis of what criteria.

Determination of Financial Exigency

The question of whether the state, acting through the administration of public higher education, has the power to invoke the rationale of fiscal crisis or emergency, and thus justify dismissal of tenured faculty, has not yet been successfully challenged. In *Lumpert v. University of Dubuque* (1975) the question of whether financial exigency

existed was based on the courts' acceptance of undisputed evidence that the college was operating at a $100,000 deficit. In *Browzin v. Catholic University* (1975) the court simply noted that "the School of Engineering and Architecture was faced with a severe budget reduction" and Browzin was subsequently notified of termination; the fiscal state was not disputed. In *Johnson et al. v. Board of Regents of the University of Wisconsin System* (1974), the court disregards the fact that the Wisconsin tenure statute (WIS. STAT. ANN. 37.31), while permitting dismissal for cause, makes no reference to dismissal in situations of financial exigency and had not then been tested in the courts. Justice Doyle admits in the Johnson case that:

> . . . should the state courts decide that the defendants simply not lay off a tenured teacher on the basis of student enrollment or fiscal factors however compelling these may be, the procedural issue raised by these plaintiffs would become moot. But this is not the answer the defendants expect from the state courts, I am sure; nor is it the judicial answer which appears to me probable; nor . . . do plaintiffs contend that the defendants are wholly powerless to lay off tenured faculty on the basis of student enrollment or fiscal factors or both (p. 234).

In the private sector, board and administrative actions were challenged in *AAUP v. Bloomfield College* (1975). Superior Court Judge Antell, in a full opinion at the close of the trial, ostensibly deferred to the judgment of the trustees, but attributed the college's problems to liquidity, and thus undercut the serious implication that exigency existed. In the Appellate Division, the court found "extraordinary circumstances because of financial exigency," but questioned the good faith of Bloomfield College in light of the demonstrated intention to eliminate tenure at the college.

While the determination that financial exigency exists continues to be left to state government and governing boards by the courts, the real assault comes when the good faith or the implementing procedures of such authorities are challenged.

Good Faith in Financial Exigency

In *Levitt v. Board of Trustees of Nebraska State College* (1974) the court noted:

> Where there is a showing that the administrative body, in exercising its judgment, acts from honest convictions, based upon the facts which it believes for [sic] the best interests of the school, and there is no showing that the acts are arbitrary, or generated by ill will . . . it is not the province of the court to interfere and substitute its judgment for that of the administrative body (p. 950).

It is clear, therefore, that the burden is on the plaintiff faculty to show that the decision was not made in good faith, since the judgment that predicates termination is ordinarily left to administrative discretion by the courts, and the courts generally claim to use the standard that guides them in reviewing administrative decisions, i.e., no *de novo* review of administrative judgment (Davis 1972). In *Levitt* the presumption of correctness could not be upset unless the decision was shown to be lacking in good faith. This meant acceptance of the administration's factual determination of financial exigency if it was sustained by substantial credible evidence. Curiously enough, the court in *Bloomfield* stated it was using the administrative review standard just mentioned, and was assigning the burden of proof to the party who was relying on the existence of a factor to discharge a contractual obligation; however, it still required that the college show financial exigency existed, especially since university officials had ready access to the information on which they relied to make the decision. But the college would not be required to establish its good faith beyond the *prima facie* case that such a condition of exigency existed. What is noteworthy in the *Bloomfield* decision is that, beyond the assumption that the exercise of administrative judgment is a managerial prerogative, the court suggests that involving faculty members in making the decision would be evidence of an action in "good faith" in the determination of financial exigency.

So it was left to the dismissed faculty to produce evidence that refuted the administration's good faith. What was produced accomplished this: the classic memo that purported to prove the president of Bloomfield's "anti-tenure motive"; the placing of faculty on one-year terminal contracts when the action did not alleviate the fiscal problems; failure to use remedial measures such as across-the-board salary reductions; termination of nontenured faculty and sale of real estate holdings; hiring twelve new faculty without adequate justification; and failure to seek faculty advice on new program developments. These facts and others—such as the "Statement on Financial Exigency and Staff Reduction" of the Association of American Colleges (1971), which includes guidelines calling for consultation, data and documentation, timing, academic due process, elimination of a faculty position (if appointment terminated), and preferential treatment of tenured over other profesional employees—convinced the judge at trial.

There is another judicial step toward evidence of institutional good faith. Brown (1976) suggests that:

> Browzin [*v. Catholic University* (1975)] takes a step, indeed a giant step, toward the proposition that good faith efforts to find a subordinate position for tenured professors are part of the good faith with which financial exigency on program discontinuance must be met. (p. 14).

Thus the challenge to institutional authority to make the initial determination as to the existence of the situation defined by the administration as financial exigency is not acknowledged by the courts, but the mode of implementation can offer the possibility of challenging that decision as lacking the good-faith requirement that the dismissal be related to the cause.

Constitutional Procedures and Identification of Individuals for Termination

Contracts of teachers in private institutions are usually not breached, according to their terms, by dismissal for financial exigency. A dismissed, tenured faculty member cannot sue for damages or reinstatement, that is, cannot challenge the administration for having violated contract rights because such determination to eliminate programs on the basis of extreme financial need was made. A contract had probably been written to make such determination an administrative prerogative. No effective counterargument can be made by faculty that minimal due process rights derived from the U.S. Constitution may have been violated, even if such rights could be established, because this argument simply does not defeat the effect of the contract according to its tenure. In *Browzin v. Catholic University* (1975), the AAUP "Recommended Institutional Regulations" were actually in the contract, and the opinion of the court essentially interprets the extent to which the institution is obliged to make every effort to find the plaintiff another suitable position where a program of instruction was terminated. The program discontinuance was considered justified and not challenged on the basis of nonexistent financial exigency. The court determined that the hiring of a new faculty member was permissible in lieu of placing the plaintiff in a related but different program that called for an individual with other background and interests. But such incorporation did not raise a question of constitutional requirements for minimal due process prior to dismissal.

By proceeding on a breach-of-contract theory, what the private college or university faculty member may get is money damages, no reinstatement, and, according to the cases decided to date, no damages for loss of reputation, with the consequent effect on career. The exception, again, is the *Bloomfield* case (1974) where there was substantial

evidence of lack of good faith in the determination of exigency and implementation of measures related to it. This permitted reinstatement on grounds other than the enforcement of the personal service contract of an individual.

In public employment, the decision in *Johnson* (1974) was based on the premise that state action—which reduced the University of Wisconsin's budget and resulted in subsequent decisions made to terminate tenured employees' contracts—was a denial of constitutional guarantees that prevent the taking of property without due process of law. Judge Doyle, the same judge who heard the *Roth* case, suggests that while faculty had an interest entitling them to procedural safeguards, these dismissals were not directed at such interests, but were the result of legislative decision-making that affected individual property interests. If the dismissals were for cause, then an adjudicatory hearing would be required to protect the plaintiffs. The court maintained that:

> The tenured teacher in a state institution is protected—substantively, so to speak—only from termination or lay-off for a constitutionally impermissible reason such as earlier exercise of First Amendment freedom of expression, or race, or religion, and from termination or lay-off which is wholly arbitrary or unreasonable (*Johnson* 1974, p. 238).

The judge found no constitutional basis for the plaintiffs' claims that the 14th amendment required faculty participation in the decision-making process. The Constitution is silent on "the choice of a basis for selection (which) lie(s) within the discretion of the state government," so the process was not unconstitutional because the initial decision-makers reviewed the decision to select individuals; and, further, the minimally required procedures need only provide the tenured teacher with a "fair opportunity to claim this substantive protection (due process)," since such procedures, shaped by the courts, must consider the institutional context as well as individual interests.

This reading of the requirements for due process dictates minimal procedures that essentially provide the terminated teacher with written notice of the reasons for the decision, disclosure of the information on which the decision-makers relied, and an opportunity to respond. Timing of the hearing, whether before or after termination, and the fact that ultimate review of the decision was made by the same administrative designee were not seen as violating constitutional protections. In addition, plaintiffs' contention that the decision-makers were not neutral or impartial—the chancellor's criteria for termination determined a layoff was in order, whereupon he designated the individ-

uals to be laid off—was not compelling to the court. "The economic interest and perspective of laid-off teachers is entitled to respect," the court said, "but the 'Fourteenth Amendment does not require that the institutions of state government be shaped in order to indicate only that interest' " (*Johnson* 1974, p. 245).

Finally, the court rejects the view that the president and chancellors in determining priorities were necessarily restricted to those priorities in effecting termination. The plaintiffs were furnished with "reasonably adequate" information that provided them with one opportunity to make a showing that "reduced student enrollments and fiscal exigency were not in fact the precipitating reason for the decision . . ." (*Johnson* 1974, p. 242).

The plaintiff failed to show, based on "reasonably adequate" information supplied, that "the ultimate decision to lay off each of them as compared with another member of their respective departments was arbitrary and unreasonable" (*Johnson* 1974, p. 242). Thus, faculty members wishing to challenge the administratively determined process of termination on constitutional grounds face a difficult task as a result of the *Johnson* decision.

In summary, the cases indicate that there are few checks on the dismissal of tenured faculty when financial exigency is perceived to be real and that the diagnosis and treatment of financial exigency are matters left entirely to administration discretion. To assure that such dismissals do not mask constitutionally impermissible reasons, the faculty member in the public institution could challenge the termination or layoff on deprivation of property, i.e., on traditional 14th amendment grounds; however, the decision in *Johnson* offers little reassurance that the courts will be hospitable to this construction of the situation.

The employee in a public institution can attempt to prove, within the limits of the information provided, that the reasons for dismissal were constitutionally impermissible. But there is little real protection of the rights of those terminated on the basis of minimal procedural requirements, since the courts have said that any property or protected interest is weaker than the policy requiring state action.

Decision-Making Authority

The delegation of administrative power that is accepted without examination by the courts is essentially derived from the overriding concern that "good government requires that the legislature and the executive maintain control over fiscal policy" and from traditional

acceptance of the view that such decisions are the rightful prerogative of management. This line of reasoning prevailed in *NOTE* (50 *N.Y.U.L. Review*, 310, 1975):

> Good government requires that the legislature and the executive maintain control over fiscal policy. The government must retain a measure of power to dismiss employees for purely budgetary reasons. When this is the motivation for the government's dismissal, no purpose is served by a trial-type hearing. As no individual culpability has attached to any employee after termination, administrative tribunals should not be allowed to impeach the fiscal wisdom of elected officials (p. 361).

and in *Bloomfield (AAUP v. Bloomfield College* 1974):

> "(The Board's) choice of alternative is beyond the scope of judicial oversight in the context of this litigation" (p. 617).

But many faculty members affected by termination would agree with Justice Douglas in the *Roth* dissent when he compared nonrenewal of a teacher's contract to the very serious consequences of any other dismisal (presumably for cause). It is not clear that the same consequences are not felt by the teacher whose program or special subject is no longer useful to the institution. Douglas asserts that:

> . . . the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher (p. 546.)

While there may be some merit in the theory that there is no consideration offered in return for the lifelong promise of employment on the part of the institution, those academics who obtain tenure would argue their reliance on continuance of a program in a way that is hard to refute (Corbin 1964, p. 90). Institutions that offer tenure, either formally or by custom and practice, do make a commitment of continuance to their faculty; thus, they bear a heavy burden of good-faith proof once the condition of financial exigency is determined. Breach of faith has serious consequences in academic communities as elsewhere.

Possible Solutions

The maintainence of a reasonable flexibility to abolish programs and reallocate resources is recognized by the courts and other commentators. The ability of administrators to make initial determinations regarding financial exigency and termination has not yet been successfully challenged at law. Arguments have been made for a law of academic status (Finkin 1973), a delegation of authority to the community of scholars (Hornby 1975), and a presumption that: "government ought always to be responsible for explaining dismissal from government employment" (*NOTE,* 50 *N.Y.U.L. Review* 310, 1975); but public policy as enforced by the courts will prevail over the need to cut budgets or to relinquish or replace the authority of governing boards and public educational administration when decisions of financial exigency are made and procedures established.

It seems obvious that courts are infrequently mindful of the trauma imposed on an institution when a determination is made that the reduced budget must result in faculty termination and/or program curtailment. There is as yet no clear-cut test, in or out of legal opinion, to define what exigency is, and the judicial response has been simply to assign the responsibility for determining exigency to administrators on a case-by-case basis. It seems unlikely that this approach will be satisfactory for all time, and certainly not for the period of the next few years of diminishing enrollments and rising costs. Two obvious solutions suggest themselves: one approach is essentially *informal,* in that it requires a considerable level of consensus between faculty and administration; the other is much more *formal,* in that it entails the procedures of collective bargaining.

An Informal Approach: Faculty-Administration Consensus

Since tenure is no protection in the face of financial exigency, faculty may wish to press for a decisive role in determination of financial exigency decisions at as many administrative levels as they can possibly achieve. The AAUP has attempted to devise adequate procedures to minimize arbitrary and mistaken decisions. Furniss observes that:

> Court cases and agency investigations arising out of good procedures are likely to result in good precedent; bad cases make bad law . . . (Brown 1976, p. 7).

There is little doubt among those who know the inner workings of colleges and universities that there is a tireless effort in most institutions to define policy, to defend it, and to permit participation in the process of establishing procedures that minimize conflict over who really decides any given issue, and who ought to decide. Observing this effort to avoid a clearcut definition of roles and authority is "like watching a basketball game in which the object (is) to take time-outs rather than complete plays" (Parker 1976, p. 238). This careful gamesmanship is often the result of an unarticulated willingness on the part of faculty and administration to allow any decision to result by consensual agreement and not by exercise of clearly defined authority.

The informal approach to the problem of "Who goes?" and "Why me?" when the budget dictates change is essentially a consensual response between administrators and faculty. Administrators know the courts will uphold their authority to make such decisions, while faculty believe that they know how to meet challenges to their tenure from long experience of assuring their rights to protection in matters of academic freedom. The result becomes a classic example of inappropriate and outmoded strategies on the part of faculty. The courts to date have protected first amendment rights more readily than they have assured procedural rights, money damages, or reinstatement to those terminated as a result of financial exigency. An examination of the approach suggested by the AAUP might yield insight into the likelihood of such an approach being successful if one assumes that the protections that would yield fairness to all parties are not yet provided by law, and that informal mechanisms may be desirable. The rationale for encouraging substantial faculty involvement:

> . . . in the decisions that attend money crises [is that] the decisions are more likely to be accepted by the faculty—if not by the victims, then at least by members of the faculty hearing committees (Brown 1976, p. 7).

This suggests that the reason for involvement is to reach consensus so that faculty are persuaded (or forced) to accept collegial disposition of resources, while at the same time administrators are kept from making those decisions alone. The steps recommended by the AAUP show how far that organization really suggests faculty go in achieving this end.

The first step, the determination of financial exigency, would be a decision in which faculty could participate in some way not detailed by the AAUP. At step two, when criteria are established for the dele-

tion of a program and/or department, it is faculty who should define priorities. Step three, the criteria for selection of individuals who might be terminated, should also be a matter for faculty only; however, the identification of specific individuals to be terminated is a task faculty willingly should concede to administration, according to AAUP guidelines.

The specific division of authority may not represent universally shared views in those academic communities that need to determine such matters, or of the courts that must eventually try to resolve disputes resulting from these determinations. However, the taxonomy of required stages of decision-making is a useful one when approaching a problem of protection of individual interests when the law is not inclined to do so.

The traditional faculty approach to institutional governance is to bifurcate administrative responsibility: the faculty want responsibility for formulating criteria for decisionmaking, but they do not want to implement the decisions they themselves make, e.g., which faculty will be dismissed. This leaves unresolved what role faculty should play in deciding if a state of financial exigency exists, which triggers all subsequent faculty-administrative interactions. Typically, the authority to decide is delegated to administrators of state or governing board stature. The determination that a work-force reduction should take place is generally made by people who manage budgets and liquidity, and not by academic administrators knowledgeable about the nonbudgetary purposes of higher education. Obviously, there would be little acceptance of this kind of decisionmaking by faculty; therefore, why the AAUP stops short of requiring faculty concurrence at this level is puzzling.

The determination of financial exigency is the one area where institutional good faith can later be questioned in court; consequently, an administrative process that does not mandate review and agreement of requisite financial distress by faculty but allows this determination to be made by others in a way that could mask covert plans to destroy tenure systems or deny permissible constitutional rights is certainly questionable. Also, if the final step of identification of specific faculty to be dismissed is left to administrative action, it essentially relieves faculty of accountability to peers for the outcome of such decisions on the individuals affected: faculty colleagues have only served on committees that identify criteria for program review, but not actually wielded the ax that falls on the necks of their colleagues.

When exigency is determined to exist and when individuals are

identified for termination effective challenge of administrative judgment can best be made. Even if a desirable outcome of shared authority is to split decisions into those that belong only to faculty and those administrators should make, it seems unwise and even naive to assume that administration will agree to execute policy made by faculty if faculty play no significant role in its formulation. Not to be overlooked is the possibility that administrators in public institutions are now liable personally in tort for decisions made by them that are shown to be intentional deprivation of constitutional rights (Hollander 1975). Finally, administrators are charged by courts and the AAUP alike with responsibility for maintaining a "viable academic program" and, therefore, must be expected to proceed in a way that will allow them to do so.

There is no assurance that the approaches advanced by the AAUP will be acceptable to either faculty or administrators, although AAUP standards on "Academic Freedom and Tenure" are frequently the basis for tenure systems, or the custom to which courts refer in deciding such cases. When the expansion or reinforcement of academic programs calls for the formulation of educational policy, academics grudgingly have shared their domain; but when reduction is the mode, it is the view in many colleges and universities that this is not in any sense a collegial responsibility.

A Formal Approach: Collective Bargaining

The assignment of responsibility by the courts and by guidelines of professional organizations has not yet provided fairness when the demands of financial exigency require change; however, another alternative remains. In the private sector of higher education, Menard (1975) argues that the NLRB and the courts have construed the duty to bargain "wages, hours and other terms and conditions of employment so broadly as to suggest that tenure" might be so considered (p. 256). According to Menard, the failure to bargain tenure policies may indeed be arguably a failure to bargain in good faith.

But the case that tenure is a management prerogative, a subject tied so closely to educational policy that it is exclusively the concern of the administration, can also be made. This view is supported primarily by those cases involving other than postsecondary schools, where statutory tenure is given the force and effect of law (Menard 1975, p. 261).

It is not entirely clear whether tenure and the limits imposed on it when financial exigency exists are mandatory subjects of collective bargaining, or whether tenure policy should be left entirely to man-

agement to extend and enforce. But there are no restrictions on considering the implications of dismissals from tenured positions as a subject for agreement at the bargaining table. There is still no clearly established precedent in the law (e.g., *Board of Education v. Associated Teachers of Huntington* 1975) for viewing management policies as a mandatory subject for bargaining if they have a substantial impact on any of labor's traditional concerns. However, including in the agreement the procedures themselves, the right to participate in the drafting of procedures for program termination, dismissal of tenured teachers, or even the contractual right to administer such procedures for faculty, assumes the risk that tenure will be regarded primarily as job security rather than a protective device for preserving academic freedom.

Moreover, it is possible that the specific procedures that would provide some measure of fairness could be decided by negotiations and made formal by a collective bargaining agreement. Topics to be discussed and negotiated would include whether seniority will be the basis for retention, whether a strict or casual order of retrenchment is most satisfactory to faculty affected by the necessity of dismissal, what role the institutional and faculty commitment to affirmative action goals will play, the precise place of merit determinations based on academic excellence in retention policy, and the possibility that early retirement be encouraged to regulate attrition. In the event of exigency, the decision to introduce such items at the bargaining table depends on the priority assigned by the parties to dispute settlement processes.

Faculty and administration may be able to informally agree on what methods to choose to protect institutional interests in maintaining program and individual interests in academic freedom and job security. But the resolution of conflict when these two sets of interests collide over a condition of financial exigency may make the bargaining table an equally, if not more desirable forum to allocate responsibility and accountability for reasonable and fair procedures.

Conclusion

The protections usually afforded by the courts and institutional custom when a tenured faculty member is dismissed for cause are not available when dismissal is the result of a determination of financial exigency. The courts have not ascertained what constitutes financial exigency, preferring to leave the definition to the governing authority and administration of each institution. Individuals dismissed have successfully challenged institutional good faith, although the burden is on the faculty member(s) to demonstrate that the decision was not made in good faith when financial exigency was determined, or when individuals were selected for termination. The courts have relied on administrators alone to establish procedures for identification of programs and individuals to be affected by the determination of financial exigency.

There are two approaches that faculty and administration may take to resolve the problems caused by the disruption of institutional continuity when tenured faculty members are terminated: the *informal* method of reaching agreement on the basis of some form of shared authority; and the *formal* method of including in collective bargaining agreements procedures that provide protection for faculty interests and job security.

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